LIM MOON HENG

v.

THE GOVERNMENT OF MALAYSIA & ANOR

HIGH COURT SABAH & SARAWAK, KUCHING
ZAKARIA SAM JC
[ORIGINATING SUMMONS NO: 24-197-2000-II]
28 JANUARY 2002

BANKRUPTCY: *Capacity of bankrupt - Application to leave Malaysia - Application rejected under s. 104 of the Income Tax Act 1967 - Whether such rejection void and invalid - Whether correct legislation applied - Bankruptcy Act 1967, s. 38(1)(c) - Income Tax Act 1967, s. 104(1)*

The plaintiff, a bankrupt, had applied to the official assignee for leave to travel outside of Malaysia; this application was granted. However, his application to the 1st defendant's agent (the Inland Revenue Board ('IRB')) seeking leave to travel overseas was rejected under s. 104 of the Income Tax Act 1967 ('ITA') unless he fulfilled certain stipulated conditions. The plaintiff contended that the Bankruptcy Act 1967 ('BA') was the only appropriate legislation governing his affairs, interests and assets, and not the ITA; thus, the certificate issued by the 1st defendant under s. 104 of the ITA was void and invalid.

Held:

[1] Section 38(1)(c) of the BA is only applicable to a bankrupt who does not owe the IRB any tax, and in such cases, the official assignee is the full and final authority to grant leave to a bankrupt to travel abroad. However, where a taxpayer still owes tax to the IRB or in a case where the IRB has filed a claim against the taxpayer with the official assignee, even though the official assignee had granted leave to a bankrupt to go overseas, as in the instant case, the Director General of the IRB, still retains, under s. 104(1) of the ITA, the power to stop him from leaving unless he fulfilled certain conditions imposed therein. (p 662 f-g)

[Application dismissed.]

Case(s) referred to:
Re Lau Hieng Yee [1999] 4 CLJ 582 ***(foll)***
Tai Choi Yu v. Government of Malaysia & Ors [1994] 2 CLJ 174 ***(refd)***

Legislation referred to:
Bankruptcy Act 1967, ss. 2, 8(1), 24(4), 38(1)(c), 58, 71, 72, 73
Income Tax Act, s. 104(1)

For the plaintiff - Anthony Bong; M/s Satem, Chai & Dominic Lai
For the 1st defendant - Hazlina Hussain
For the 2nd defendant - Ko Fui Long

Reported by Suresh Nathan

JUDGMENT

Zakaria Sam JC:

The plaintiff took out this application by way of an originating summons to seek the determination and declaration of the court on the following questions:

1. That the Income Tax Act 1967 (Act 53) is only applicable to persons who are not adjudged bankrupts and the said Act is therefore not applicable to the plaintiff who is adjudged bankrupt and that the Bankruptcy Act 1967 (Act 360) is the only appropriate legislation governing the affairs, interests and assets of the plaintiff being an adjudged bankrupt.

2. That the 1st defendant by submitting their claims for unpaid income tax revenue from the plaintiff to the 2nd defendant has subrogated its jurisdiction over the plaintiff to the 2nd defendant and that the 2nd defendant under sections 8, 24(4) and 58 of the Bankruptcy Act 1967 (Act 360) has jurisdiction over all affairs respecting the assets and interests of the plaintiff.

3. The 1st defendant has therefore no right or jurisdiction to restrict or hinder the plaintiff's freedom of movement as guaranteed by the Federal Constitution by prohibiting the plaintiff from traveling freely out of Malaysia under section 104 of the Income Tax Act.

4. That the 1st defendant shall with immediate effect annul the Certificate issued under section 104 of the Income Tax Act 1967 (Act 53) against the plaintiff in order to allow the plaintiff to travel freely out of Malaysia without any conditions.

At the hearing of the application, the 2nd defendant herein informed this court that it had given its sanction to the plaintiff to take up this application as neither the property nor the estate of the plaintiff is involved.

Brief Facts

The plaintiff was adjudged a bankrupt on 30 November 1987 under Bankruptcy Proceedings No. 285/86. As the plaintiff had various business contacts overseas, the plaintiff applied to the official assignee, Kuching for leave to travel outside Malaysia and leave was granted by a letter dated 20 November 1998 and a bank guarantee of RM50,000 was furnished by Citiloan Mortgage S/B as security.

The plaintiff, after being granted leave by the official assignee, Kuching to travel out of Malaysia then instructed his advocates M/s Goh & Partners to write to the 1st defendant's agent, the Inland Revenue Board, to seek leave to travel outside Malaysia. His application was rejected purportedly under s. 104 of the Income Tax Act, unless the following conditions could be fulfilled:

(a) that the income tax assessment of RM197,140.09 is settled in full; or

(b) a Bank Guarantee of RM200,000 is furnished.

It is the contended that the 1st defendant has no authority to restrict the plaintiff's right to travel out of Malaysia. This is based on the fact that once a person is adjudged a bankrupt under s. 8(1) of the Bankruptcy Act, the official assignee shall be receiver of any property and no creditor with respect to any debt shall have any remedy against the property of the adjudged bankrupt in respect of the debt. It was further explained that by virtue of ss. 24(4) and 58 of the Bankruptcy Act, the property of an adjudged bankrupt is vested in the official assignee. Since the 1st defendant through its agent had filed a proof of debt with the official assignee, the status of the 1st defendant is the same as any other creditors of the plaintiff. As such, under ss. 8, 24(4), 58, 71, 72 and 73 of the Bankruptcy Act, the official assignee has control over the estate of the plaintiff and the 1st defendant's agent therefore has no authority to intervene by issuing a s. 104 Certificate under the Income Tax Act. The plaintiff being an adjudged bankrupt, the said certificate, therefore, should be issued against the official assignee being the receiver and manager of the plaintiff's estate.

In short, the plaintiff pointed out that the Income Tax Act is only applicable to those who are not adjudged bankrupts and the Act is therefore not applicable to the plaintiff who is an adjudged bankrupt. The Bankruptcy Act 1967 is the only appropriate legislation governing the affairs, interest and assets of the plaintiff; being an adjudged bankrupt. Thus, the certificate issued under s. 104 of the Income Tax Act by the 1st defendant is void and invalid.

The 1st defendant on the other hand submitted that the certificate issued under s. 104 of the Income Tax Act is valid though the plaintiff is an adjudged bankrupt.

Findings

There is no doubt that the plaintiff was caught in a very difficult and awkward situation where the official assignee had granted him leave to travel out of Malaysia but was barred from leaving by the 1st defendant unless he settled his debt in full or furnished a bank guarantee to the amount of RM200,000.

The pertinent question here is – who indeed has the authority to grant the said leave to the plaintiff who is a bankrupt? In order to answer this question, one has to look at the wordings of s. 38(1) of the Bankruptcy Act and s. 104(1) of the Income Tax Act respectively.

The authority of the official assignee to grant the said leave is provided under s. 38(1)(c) of the Bankruptcy Act which reads:

> Where a bankrupt has not obtained his discharge the bankrupt shall not leave Malaysia without the previous permission of the official assignee or the court.

The 1st defendant on the other hand is conferred with such authority under s. 104(1) of the Income Tax Act which reads:

> The Director General, where he is of the opinion that any person is about or likely to leave Malaysia without paying:
>
> (a) all tax payable by him (whether or not due or due and payable);
>
> (b) all sums payable by him under section 103(4), (5), or (5A); and
>
> (c) all debts payable by him under section 107A(2) or 109(2), or 109B(2)
>
> may issue to any Commissioner of Police or Director of Immigration a certificate containing particulars of the tax, sums and debts so payable with a request for that person to be prevented from leaving Malaysia unless and until he pays all the tax, sums and debts so payable or furnishes security to the satisfaction of the Director General for their payment.

After careful perusal of both provisions, I am of the opinion that s. 38(1)(c) of the Bankruptcy Act is only applicable to a bankrupt who does not owe the Inland Revenue Board any tax. In such case, the official assignee is the full and final authority to grant leave to a bankrupt to travel abroad. However, where a taxpayer still owes tax to the Inland Revenue Board or in a case where the Inland Revenue Board has filed a claim against the taxpayer with the official assignee, though the official assignee had granted leave to a bankrupt to go overseas, as in the instant case, the Director General of Inland Revenue Board, still retain, under s. 104(1) of the Income Tax Act, the power to stop him from leaving unless he fulfilled certain conditions imposed therein.

The issuance of certificate under s. 104(1) of Income Tax Act is one of the authorised modes to recover the tax due as was held by the Supreme Court in the case of *Tai Choi Yu v. Government of Malaysia & Ors* [1994] 2 CLJ 174 that:

> One of the primary function of the Director General of Inland Revenue under the Act is to collect and recover assessed tax effectively, and to do that, he must employ all the modes of recovery authorized in Pt VII (ss. 103, 111) of the Act. Action under s. 104 is one of the authorized modes. It is the requirement of s. 103 of the Act that a person pays his assessed tax on the service of the notice of the assessment on him failing which the Director General of Inland Revenue may besides using all other authorized modes, proceed to recover in court the assessed tax as a debt due to the Government and if judgment is obtained, to execute the judgement.

Likewise, in a case where a bankrupt had settled his tax and granted leave by the Director General of the Inland Revenue Board to travel abroad, the bankrupt still, under s. 38(1)(c) of the Bankruptcy Act requires the approval of the official assignee for such trip if he still owes other claimants.

My finding that the Director General of Inland Revenue Board has the power to stop the plaintiff from leaving Malaysia is further fortified by the fact that an international passport is not a property as defined under s. 2 of the Bankruptcy Act where it was held in the matter *Re Lau Hieng Yee, a Bankrupt* [1999] 4 CLJ 582 that:

> In our case the international passport of the applicant cannot be turned into an asset for payment of debts to the creditors. So I am of the view that the international passport of the applicant does not come within the ambit of the definition of property under s. 2 of the Bankruptcy Act. As such, s. 24(4) of the Bankruptcy Act has no application. In other words, the international passport of the applicant does not vests in the official assignee.

Since the international passport is not vested in the official assignee, the 1st defendant still possess the right to stop the plaintiff from leaving Malaysia unless he fulfilled the conditions stipulated ie, to pay the debt in full or pay a deposit of RM200,000.

On the above grounds, it is abundantly clear that the question as to which of the two Acts take precedent over the other does not arise. The two laws have their distinct applications. The Income Tax Act was enacted to regulate the collection of revenue of the country and the Bankruptcy Act to protect the creditors' interests. It is not wrong to say that these two Acts are both complementary and yet independent of each other. Therefore, it is only prudent for these two bodies to give due regard to their respective roles and responsibilities and to coordinate their decisions in order to avoid any unpleasant situation as happened in this case.

Conclusion

For the reasons as given above, the originating summons is hereby dismissed with costs.